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Micah Echols

Judicial Clerk for the Honorable Sally Loehrer, District Judge, Eighth Judicial District

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Are Private Automobile Insurance Companies Replacing
Workers' Compensation Coverage When the
Employee/Insured is Injured in the Course and Scope of
Employment by a Third-Party Tortfeasor?: *Rubin v. State
Farm Mutual Automobile Insurance Company*¹

MICAH ECHOLS*

I. INTRODUCTION

Multiple sources for recovery are available for an employee who is physically injured by a third-party tortfeasor in the course and scope of employment. This is especially true when the physical injury triggers coverage under a health insurance policy or other type of insurance policy for medical benefits.² First, assuming that the employer participates in workers' compensation insurance, the employee is entitled to receive workers' compensation benefits for medical expenses. Second, the employee can also recover payments for medical benefits from the third-party tortfeasor in a common-law negligence lawsuit. Third, the employee, who in this context would be considered "the insured," can also make a claim for medical benefits under a private health insurance policy, private automobile insurance policy, or some other variety of private insurance.

Although there are multiple avenues for recovery, the employee/insured is never allowed to receive and retain payments for medical benefits from all these sources.³ Different states have, however, given the workers' compensation carrier, the third-party tortfeasor, and the private insurance company different rights in terms of their ability to subrogate and offset another entity's payments for medical benefits in such situations.⁴ This Note will specifically examine the situation when an employee is injured by a third-party tortfeasor in the course and scope of employment, and there is also available coverage through the employee/insured's

* Judicial Clerk for the Honorable Sally Loehrer, District Judge, Eighth Judicial District (Clark County), Las Vegas, Nevada during the 2003–2004 Term; J.D., 2003, J. Reuben Clark Law School, Brigham Young University; B.A., 1999, Brigham Young University.

1. 43 P.3d 1018 (Nev. 2002).

2. See generally Job A. Sandoval, *Insured's Receipt of or Right to Workmen's Compensation Benefits as Affecting Recovery Under Accident, Hospital, or Medical Expense Policy*, 40 A.L.R.3d 1012 (1971).

3. See *infra* discussion on subrogation and offsetting, Part II.B.

4. See *id.* & *infra* discussion, Parts IV & V.

private automobile insurance policy in the form of benefits for medical payments (med-pay), which is also known in some jurisdictions as personal injury protection (PIP) or no-fault medical benefits.⁵

In 2002, the Nevada Supreme Court held in *Rubin v. State Farm Mutual Automobile Company* that a workers' compensation exclusionary clause in a private insurance contract does not apply where an injured employee subsequently recovers damages from a third-party tortfeasor.⁶ The recovery the employee receives from the third-party tortfeasor, however, is to be reimbursed to the workers' compensation carrier until workers' compensation is made whole. Finally, the *Rubin* court also allows the employee/insured to recover payments for medical benefits under the insured's med-pay clause of his private automobile insurance policy.

This Note contends that under *Rubin* when an employee recovers medical benefits from both workers' compensation and the employee's own private insurance, the insured employee should either not be entitled to med-pay benefits from the private insurance company, or the private automobile insurance company should be permitted to subrogate against the third-party tortfeasor for med-pay benefits already paid to the insured. Many other jurisdictions support this approach.⁷ This Note concedes, however, that *Rubin* was correctly decided under Nevada law since subrogation of med-pay benefits in Nevada is against public policy.⁸ Although some states have allowed the same result as the decision in *Rubin*,⁹ the opposing view is better because it serves the purpose of no-fault med-pay benefits, discourages the windfall of a double recovery, and requires that physical injuries sustained in the course and scope of employment are primarily covered by workers' compensation.

Part II of this Note will provide background information on no-fault medical benefits, subrogation and offsetting, and the collateral source rule as they relate to med-pay benefits. Part III of this Note will report the

5. Note, however, that some jurisdictions have made PIP primary coverage and med-pay secondary coverage, although they both serve the same basic purpose to cover personal injuries sustained in automobile accidents. See e.g. *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 55 (Ky. 2000) ("Since the Med-Pay coverage is excess insurance over the PIP coverage, the PIP coverage is primary and the Med-Pay coverage is secondary, i.e., the PIP coverage must be paid in full before any part of the Med-Pay coverage is due and payable."); see also *State Farm Mut. Automobile Ins. Co. v. Swearingen*, 590 So. 2d 506, 506 (Fla. 4th Dist. App. 1991) ("The purpose of the [med-pay] coverage is to pay that portion of medical expenses not covered by the mandatory personal injury protection (PIP or no fault) which pays eighty percent of reasonable medical expenses up to a stated monetary limit, typically \$10,000.00.").

6. *Rubin*, 43 P.3d 1018 at 1022.

7. See *infra* discussion Part V.

8. *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 813 (Nev. 1986) ("We hold that a subrogation clause under which the insurer obtains subrogation rights from its insured for medical payments violates public policy.").

9. See *infra* discussion Part IV.

facts, procedural history, and reasoning of the *Rubin* decision. Part IV will analyze the *Rubin* decision using explanations from other jurisdictions that have reached similar results. Part V will explain the problems associated with the *Rubin* situation, and offer alternate solutions, as reached in jurisdictions other than Nevada. Part VI will briefly conclude this Note.

II. BACKGROUND

A. *No-Fault Medical Benefits*¹⁰

No-fault medical benefits are exactly as they sound—when an insured is in an automobile accident, he is entitled to payment for medical benefits regardless of who is at fault. To receive no-fault medical benefits, the insured need only present documentation to his insurer that (1) there is expense related to physical injury, which was (2) caused in an automobile accident.¹¹ The purpose of no-fault medical benefits is to provide prompt payment for medical expenses to the policyholder without having to wait for the long and sometimes drawn-out process of making a claim with another form of insurance.¹²

B. *Subrogation and Offsetting*¹³

1. *Private Automobile Insurance Companies*

While no-fault medical benefits are focused on an insured's recovery for injuries resulting from an automobile accident, med-pay benefits with

10. See generally Vitauts M. Gulbis, *Validity and Construction of No-Fault Insurance Plans Providing for Reduction of Benefits Otherwise Payable by Amounts Receivable from Independent Collateral Sources*, 10 A.L.R.4th 996 (1981).

11. See *McIntosh v. State Farm Mut. Automobile Ins. Co.*, 488 N.W.2d 476, 480 (Minn. 1992) ("It is enough if the victim accidentally injures herself. In other words, the focus is not on the tortfeasor; rather, no-fault benefit eligibility is dependent exclusively on the injured victim and whether she has been hurt under circumstances arising from the use of a motor vehicle. This is true first party coverage.").

12. See *Presbyterian Hosp. v. Maryland Cas. Co.*, 683 N.E.2d 1, 7 (N.Y. 1997) ("No-fault reform was enacted to provide prompt uncontested, first-party insurance benefits. That is part of the price paid to eliminate common-law contested lawsuits. Indeed, contrary to the insurer's assertions, preclusion of this type was an available remedy at common law, and if this important facet of the juridical rights and remedies among the various interested parties is to be deemed eliminated, it must be evident more plainly and expressly as this would be in derogation of a common-law protection. The tradeoff of the no-fault reform still allows carriers to contest ill-founded, illegitimate and fraudulent claims, but within a strict, short-leashed contestable period and process designed to avoid prejudice and red-tape dilatory practices.") (citations omitted).

13. See generally J.A. Bock, *Subrogation Rights of Insurer under Medical Payments Provision of Automobile Insurance Policy*, 19 A.L.R.3d 1054 (1968).

subrogation and offsetting clauses are concerned with preventing *double* recovery by the insured for that same injury.¹⁴

Subrogation occurs when the private insurer has paid med-pay benefits to its insured and the insured later receives additional recovery from another source for the same physical injuries. Subrogation is the insurer's right for reimbursement of money that exceeds the medical expenses the insured has received.¹⁵ If the insured does not receive additional payment from another source, subrogation does not operate, and the med-pay benefits function as no-fault benefits.¹⁶

Offsetting occurs when the insured receives medical payments for physical injuries from another source *before* making a claim for the med-pay benefits from the insurer.¹⁷ The insurer then can withhold medical payments from the insured to the extent that they have already been paid by the other source.¹⁸ As a corollary, when the medical payments have been paid in full by the collateral source, the insurer pays nothing to the insured.

14. See *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 458 (Utah 1969) ("Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor."); see also *Thiringer v. Am. Motors Ins. Co.*, 588 P.2d 191, 194 (Wash. 1978) ("Subrogation is an equitable doctrine, and an examination of the cases cited by both parties shows that courts, unless otherwise directed by statutory requirements, attempt to resolve each case upon a consideration of the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery. The insurer's interest in its right of subrogation is, of course, always a factor to be considered.").

15. See *Hartford Accident & Indem. Co. v. Gropman*, 209 Cal. Rptr. 468, 471 (Cal. Super. App. Dept. 1984) ("It has been clearly established in California that insurance contract provisions, although classified as adhesion contracts, requiring reimbursement of medical payments under the label of subrogation but providing only access to the proceeds of settlement or judgment resulting from the exercise of rights of recovery by the injured person, are valid and enforceable.") (citation omitted); see also *Milbank Ins. Co. v. Henry*, 441 N.W.2d 143, 145 (Neb. 1989) ("We now hold that a subrogation clause of this kind which gives an insurer a right to subrogation against a third-party tortfeasor for medical payments actually made is a valid and enforceable contractual provision. It is well established as a principle of equity that upon payment of a loss an insurer is entitled to pursue those rights which the insured may have against a third party whose negligence or wrongful act caused the loss. Applying this principle, the majority of jurisdictions have upheld the validity of insurance provisions which confer on an insurer a right of subrogation against third-party tortfeasors for medical payments actually made to its insured.") (Citations omitted).

16. See *Gable v. Colonial Ins. Co.*, 548 A.2d 135, 136–37 (Md. 1988) (holding that insured who was entitled to workers' compensation benefits, but had not pursued workers' compensation claim, was entitled to recover full PIP benefits from insurer).

17. Unif. Motor Veh. Reparations Act § 11(a), 14 U.L.A. 41 (1980) (The Uniform Motor Vehicle Reparations Act provides that in calculation of net loss, the insurer shall set off recoveries of social security benefits, workmen's compensation benefits, and state-required temporary disability insurance); see also *Coreno v. Am. Transit Ins. Co.*, 575 N.Y.S.2d 254, 255 (N.Y. Super. 1991) (finding that the no-fault insurer may deduct the amount of such benefits upon a mere showing of their availability; the right of the insurer to deduct is not contingent upon their actual receipt.).

18. See e.g. *Berger v. Wien Air Alaska*, 995 P.2d 240, 242–43 (Alaska 2000) (explaining that when an insured first recovers from a third-party tortfeasor, an insured can offset those amounts actually received by the insured).

The policy behind subrogation and offsetting acknowledges that once the medical payments for the physical injury have been made once, any other recovery for medical payments will not actually be used for the physical injury. The alternative would result in a windfall for the insured. Additionally, whenever each insured is only entitled to one recovery, the insurer is able to offer med-pay coverage at a more reasonable premium.¹⁹

2. *Workers' Compensation*

Unlike med-pay coverage, which is only sometimes subject to subrogation based on the jurisdiction, the workers' compensation carrier can almost always subrogate against a third-party tortfeasor.²⁰ The workers' compensation carrier, however, is almost always barred from subrogating against the insured's own private automobile insurance company.²¹

Offsetting is generally not sought by a workers' compensation carrier because when an employee sustains a physical injury in the course and scope of employment, workers' compensation usually provides the primary coverage. The private automobile insurance company, therefore, usually does not have a reason to subrogate against the workers' compensation carrier for med-pay benefits paid to the insured. If the workers' compensation carrier provides medical benefits to the employee/insured, the private

19. See generally Vitauts M. Gulbis, *supra* n. 10.

20. See e.g. *Breen v. Caesars Palace*, 715 P.2d 1070, 1071–72 (Nev. 1986) (“Pursuant to NRS 616.560 [now NRS 616C.215] an employer may assert a subrogation interest in compensation paid to an employee by a third-party tortfeasor where a work-related ‘injury was caused under circumstances creating a legal liability’ in a third party.”); see also *City of Meadville v. Workers' Comp. App. Bd.*, 810 A.2d 703, 705 (Pa. Cmmw. 2002) (“[W]here a third party’s negligent conduct causes injury to an employee actually engaged in the business of his employer, there is a clear, justifiable right to subrogation under Section 319 of the [Workers’ Compensation] Act.”); see also *Combined Ins. v. Shurter*, 607 N.W.2d 492, 497 (Neb. 2000) (referencing Nebraska Revised Statutes § 48-118, which grants an employer who has paid workers’ compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against that third party).

21. *Standish v. Am. Mfrs. Mut. Ins. Co.*, 698 A.2d 599, 601 (Pa. 1997) (holding that when an insurance policy is specifically designed to benefit the policyholder (such as med-pay benefits) workers’ compensation does not have a right of subrogation against the insured’s private automobile insurance company); see also *River Gas Corp. v. Sutton*, 701 So. 2d 35, 39 (Ala. Civ. App. 1997) (discussing same situation in which first-party underinsured benefits of insured were not subject of subrogation by workers’ compensation. Same analysis would apply to first-party med-pay benefits.). This policy is also explained in *Truck Ins. Exch. v. State Industrial Ins. Sys.*, 823 P.2d 279 (Nev. 1991) in which the court explains that according to statute, workers’ compensation may only subrogate against third-party tortfeasors. The court further explains that proceeds received from a private insurance policy arise from a contract between the parties, which does not statutorily qualify as a third-party tortfeasor. *Id.* at 280-81. Furthermore, when an employee is injured in the course and scope of employment, workers’ compensation provides primary coverage. Accordingly, all other forms of private insurance should be treated as secondary. If workers’ compensation were allowed to subrogate against the employee’s private insurance, the result would be that the private insurance would be primary coverage for workplace injuries.

automobile insurance company is usually allowed to offset those medical benefits before disbursing med-pay benefits, if any, to the insured.²²

Lastly, the situation that is the subject of this Note, and which creates the greatest split among jurisdictions, is when an employee is injured by a third-party tortfeasor in the course and scope of employment. Here, the workers' compensation carrier provides initial medical benefits, but will then seek reimbursement, through subrogation, from any recovery between the employee/insured and the third-party tortfeasor. Once the workers' compensation carrier is made whole, and therefore out of the picture, courts disagree whether the employee/insured can still collect med-pay benefits from the private automobile insurance carrier, despite the employee/insured having his medical payments paid for from the third-party tortfeasor.²³

C. Collateral Source Rule

The collateral source rule provides that admission of a collateral source of payment for an injury into evidence is per se improper.²⁴ If this broad reading of the collateral source rule were applied to the subrogation and offsetting scheme, the rights of the workers' compensation carrier and the insured's private automobile insurance company would be frustrated because each party would not know what the other is doing. Therefore, the collateral source rule is usually only applied to the defendant/third-party tortfeasor in a personal injury lawsuit.²⁵

22. See e.g. *Griebel v. Tri-State Ins. Co.*, 311 N.W.2d 156, 159 (Minn. 1981) ("Because both no-fault and workers' compensation benefits might be payable in some instances, the legislature has stated that an additional purpose of the no-fault act is to provide offsets to avoid duplicate recovery. As a part of this scheme, the payment of workers' compensation benefits is primary. Thus, when a claimant receives benefits under no-fault and workers' compensation, the legislature has indicated that the no-fault benefits must be reduced by the amount of workers' compensation benefits paid.") (citations omitted).

23. This issue is fully discussed *infra* Parts IV & V.

24. *Proctor v. Castelletti*, 911 P.2d 853, 854 (Nev. 1996).

25. See *Cramer v. Peavy*, 3 P.3d 665, 669 (Nev. 2000) (explaining that NRS 616C.215 does not supersede *Proctor*, but rather the statute is an exception to the per se rule against collateral sources). The *Proctor* rule must endure against defendants/third-party tortfeasors because otherwise any insured plaintiff would not be entitled to recovery in a personal injury lawsuit; see also *Bruner v. Caterpillar, Inc.*, 627 So. 2d 46, 47 (Fla. App. 1993) (holding that defendant was not entitled to collateral source offset for workers' compensation benefits despite subrogation waiver); see also *Pustaver v. Gooden*, 566 S.E.2d 199, 200-01 (S.C. App. 2002) (explaining that the collateral source rule only applies against the tortfeasor); see also *Heritage Mut. Ins. Co. v. Graser*, 647 N.W.2d 385, 388-90 (Wis. App. 2002) (explaining that the collateral source rule and subrogation are complementary legal concepts, and disallowing plaintiff's invocation of the collateral source rule to bar subrogation); but see John L. Antracoli, Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 Hastings L.J. 667 (1986) (arguing that the California collateral source rule should be applied uniformly to uninsured motorist benefits except when plaintiff's insurer has brought a previous action against the uninsured motorist).

III. *RUBIN V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY*²⁶A. *Facts*

While in the course and scope of her employment, Anna Rubin was struck by a vehicle as she walked near the loading dock of a grocery store.²⁷ The State Industrial Insurance System (SIIS)²⁸ paid Rubin's medical bills, totaling more than \$11,500.00.²⁹

After SIIS realized that Rubin's injuries were caused by the negligent acts of third-party tortfeasors, it notified Rubin that SIIS would seek reimbursement from any third-party recoveries Rubin might obtain from the tortfeasors.³⁰

When Rubin discovered that SIIS would seek reimbursement, she filed suit against the third-party driver and the owner of the grocery store (tortfeasors) where the accident occurred.³¹ Following Rubin's settlement with the tortfeasors, SIIS required her to reimburse it eighty percent of the amount it had asserted as its lien.³²

Rubin also filed a claim for medical payment benefits with her private automobile insurance carrier, State Farm Mutual Automobile Insurance

26. 43 P.3d 1018 (Nev. 2002).

27. *Id.* at 1019.

28. The court noted that in July 2000, SIIS was renamed Employer's Insurance Company of Nevada. But, because the events surrounding this case took place before the name change, the *Rubin* opinion uniformly referred to the entity as SIIS. *Id.* at 1019 & n. 1. The author refers to either of these entities as workers' compensation.

29. *Id.* at 1019.

30. *Id.* SIIS had a statutory right, according to Nevada Revised Statutes 616C.215, "to receive reimbursement by creating a lien on the 'total proceeds' that an injured employee recovers from third persons, which might include recovery for non-economic as well as economic damages." *Id.* In some jurisdictions, the law requires either that the plaintiff seek recovery from the third-party tortfeasor, or the insurer will be able to stand in the shoes of the insured. *See e.g.* Ga. Code Ann. § 34-9-11.1(c) (Harrison 1998) ("[A third-party action] against [a third party] by the employee must be instituted in all cases within the applicable statute of limitations. If such action is not brought by the employee within one year after the date of injury, then the employer or such employer's insurer may but is not required to assert the employee's cause of action in tort, either in its own name or in the name of the employee."); *Kimbrell v. Paige*, 448 So. 2d 1009, 1011 (Fla. 1984) (finding that Florida Statute § 440.39(2) gives the carrier the right to institute an action against the third-party tortfeasor if the employee does not institute an action during the first year after the accrual of the cause of action).

31. *Rubin*, 43 P.3d at 1019. The fact that Rubin filed suit against the tortfeasors implies that she believed that she would be able to recover some amount in excess of what she would have to reimburse SIIS. Therefore, this arrangement would allow perhaps a substantial recovery by a plaintiff, such as Rubin, from the third party in cases involving multiple tortfeasors.

32. *Id.* The court pointed out that SIIS is required to contribute a proportionate share of litigation expenses, according to *Breen v. Caesars Palace*, 715 P.2d 1070 (Nev. 1986). So, after Rubin repaid the eighty percent asserted in the SIIS lien, the court speculated that Rubin and SIIS were negotiating on how much of the remaining twenty percent would be applied to litigation expenses. *See Rubin*, 43 P.3d at 1019 n. 3.

Company (State Farm).³³ State Farm denied coverage, based on an exclusionary clause in Rubin's policy: "THERE IS NO COVERAGE: FOR MEDICAL EXPENSES FOR *BODILY INJURY*: TO THE EXTENT WORKER'S COMPENSATION BENEFITS ARE REQUIRED TO BE PAYABLE"³⁴ Moreover, State Farm argued that SIIS had already paid Rubin's medical bills, so the exclusion was triggered, and any coverage from State Farm would constitute a double recovery of medical expenses.³⁵

B. Procedural History

Rubin filed a complaint against State Farm in Nevada state court alleging breach of contract and bad faith denial of coverage.³⁶ State Farm removed the matter to federal district court and filed a motion for summary judgment.³⁷ The federal district court granted State Farm's motion for summary judgment, reasoning that State Farm's exclusion controlled and State Farm was entitled to judgment as a matter of law because Rubin could not prove that she had any medical bills that were not paid or payable by SIIS.³⁸

Rubin appealed to the Ninth Circuit Court of Appeals, which declined to rule on the issue.³⁹ Instead, the Ninth Circuit certified two questions to the Nevada Supreme Court:

- (1) Under Nevada law, does a provision in an automobile insurance policy excluding coverage for medical expenses resulting from bodily injury for which workers' compensation is payable apply to medical expenses that are paid by workers' compensation but recovered from a third-party tortfeasor?
- (2) If the exclusionary clause is interpreted to apply to those expenses, does it violate Nevada public policy?⁴⁰

The Nevada Supreme Court answered the first question in the negative, concluding that "the policy exclusion at issue does not apply to medical expenses initially paid by workers' compensation but ultimately reim-

33. *Rubin*, 43 P.3d at 1019. (emphasis in original).

34. *Id.* at 1019–20.

35. *Id.* at 1020.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The Ninth Circuit opinion is reported at *Rubin v. State Farm Mut. Automobile Ins. Co.*, 222 F.3d 750 (9th Cir. 2000).

40. *Rubin*, 43 P.3d at 1019.

bursed from the insured's third-party recovery."⁴¹ Since the first question was answered in the negative, the second question was irrelevant and, therefore, was not addressed.⁴²

C. Reasoning

In addressing the first certified question, the Nevada Supreme Court examined the exclusion as a "matter of contract interpretation" requiring an examination of the policy language.⁴³

Before getting to the substance of the contractual provisions, the *Rubin* court set forth three well-established principles in interpreting insurance contracts. First, when determining an insurance policy's meaning, the court will examine the language from a layperson's viewpoint.⁴⁴ Second, an insurer that intends to restrict a policy's coverage must use language that clearly communicates the scope of the limitation to the insured.⁴⁵ Third, any ambiguity or uncertainty in the policy must be construed against the insurer and in favor of coverage for the insured.⁴⁶

Rubin contended that the "required to be payable" language referred to benefits that "are non-returnable or non-refundable to SIIS."⁴⁷ Rubin further argued that because the medical benefits initially advanced to Rubin by SIIS were largely reimbursed through her later third-party recoveries, her medical expenses were not within the exclusion.⁴⁸ State Farm, how-

41. *Id.*

42. *Id.*

43. *Id.* at 1020.

44. *Id.* This principle was confirmed in *Natl. Union Fire Ins. Co. v. Reno's Exec. Air*, 682 P.2d 1380, 1382 (Nev. 1984) ("In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense.").

45. *Rubin*, 43 P.3d at 1020. This principle was confirmed in *Reno's Exec. Air*, 682 P.2d at 1382 ("[A]n insurer wishing to restrict the coverage of a policy should employ language which clearly and distinctly communicates to the insured the nature of the limitation.").

46. *Rubin*, 43 P.3d at 1020. This principle was also confirmed in *Reno's Exec. Air*, 682 P.2d at 1383 ("Any ambiguity or uncertainty in an insurance policy must be resolved against the insurer and in favor of the insured."). This third principle is sometimes referred to as *contra proferentum*, literally meaning "against him who proffers." See Charlton T. Lewis & Charles Short, *A Latin Dictionary* 452, 1457 (Oxford 1995) (1879); see also *Dickenson v. Nev. Dept. of Wildlife*, 877 P.2d 1059, 1063 (Nev. 1994) (Rose, J., concurring and dissenting) (discussing the maxim of *contra proferentum* as construing a document against the State). The doctrine of *contra proferentum* is more commonly known as "construe against the drafter." See *Am. Fire & Safety, Inc. v. City of North Las Vegas*, 849 P.2d 352, 362 (Nev. 1993) ("[W]e construe an ambiguous contract provision against . . . the drafter of the ambiguous provision.").

47. *Rubin*, 43 P.3d at 1020.

48. *Id.*

ever, asserted that “the exclusion is unambiguous and applies because the workers’ compensation benefits were ‘payable.’”⁴⁹

The Nevada Supreme Court explained that the language of the exclusion is clear when applied to usual workers’ compensation cases. The exclusion’s application usually occurs when an employee is injured on the job and receives workers’ compensation benefits without the existence of a third-party tortfeasor.⁵⁰ In such a case, workers’ compensation benefits are paid to the injured employee and the payment is not reimbursed. Accordingly, a private insurer would be able to offset the amount paid or payable to the injured employee from workers’ compensation.⁵¹ The policy behind this law is noted by the court:

The primary purpose of this anti-duplication clause is to memorialize that SIIS is the primary source of payment when an insured is involved in a work-related automobile accident, and to prevent double recovery by the insured for the same element of loss.⁵²

The *Rubin* court next determined that when the insured is forced to reimburse the workers’ compensation carrier out of personal assets, the applicability of the exclusion is uncertain.⁵³ As such, a latent ambiguity resulted; even though the benefits were not only payable, but paid, and then reimbursed, the benefits may be considered ‘payable’ under the exclusion or ‘not payable’ since Rubin did not retain them once SIIS was reimbursed from the third-party settlement.⁵⁴ Accordingly, the court reasoned, “Rubin has been placed in the position of one for whom workers’ compensation

49. *Id.* By using the word “payable” instead of “paid” in its policy, State Farm takes itself out of the potential dispute involving what was actually paid, instead of what should have been paid by the claimant’s other sources. See *Employers Ins. Co. v. Chandler*, 23 P.3d 255, 258 (Nev. 2001) (“[A]n insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee has exhausted any third-party settlement proceeds because the plain meaning of the term ‘compensation’ in NRS 616C.215 includes medical benefits.”). Therefore, if a claimant has not exhausted payment of medical benefits from other sources, the excess insurer may treat the other payments as exhausted for purposes of offsetting to calculate how much the insurer should pay to its claimant, provided that the policy language allows the offset, according to category of source.

50. *Rubin*, 43 P.3d at 1020.

51. See discussion *supra* n. 49 on the difference between “payable” and “paid.” Some policies are actually construed to mean “payable” instead of “paid.” See *Contl. Cas. Co. v. Riveras*, 814 P.2d 1015, 1018 (Nev. 1991) (holding that benefits payable to school district employee would be reduced by amount of unreimbursed compensation employee *received* from SIIS) (emphasis added).

52. *Rubin*, 43 P.3d at 1020. The double recovery, then, in workplace injury cases not involving a third-party tortfeasor would be one recovery from workers’ compensation and another recovery from the employee’s own private insurance.

53. *Id.* at 1021.

54. *Id.* (citing Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d vol. 2, § 21.12 (Clark Boardman Callaghan 1997)).

benefits were never payable.”⁵⁵ As a result, the *Rubin* court found that the exclusion did not apply.⁵⁶ The court also rejected State Farm’s argument that it could escape liability based on “other insurance” that had been rendered “out-of-pocket.”⁵⁷

Elaborating on the offsetting problem, the *Rubin* court explained further that “reimbursement nullifies the initial payment.”⁵⁸ In other words, SIIS’ initial payments were more akin to an advance.⁵⁹ Moreover, the Nevada Supreme Court opined that any concern about double recovery was non-existent because “[w]here there is a recovery from a third-party tortfeasor, the ultimate payment of medical expenses is not by workers’ compensation, but by the injured party herself.”⁶⁰

Finally, the court recognized that other courts have applied exclusion clauses in cases involving similar facts to *Rubin*.⁶¹ The *Rubin* court, however, decided to side with those courts, holding that “such exclusions or offset provisions lose their meaning when the workers’ compensation insurer successfully asserts its subrogation rights on third-party proceeds.”⁶² One such court was the Florida Second District Court of Appeal, which held that “an insured in this situation is in the same position as one who never had any workers’ compensation benefits paid The insured should not be penalized simply because he was hurt on the job.”⁶³ Therefore, the Nevada Supreme Court answered the first certified question in the

55. *Id.*

56. *Id.*

57. *Id.* (referencing *Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.*, 341 P.2d 110, 119 (Or. 1959) (“The ‘other insurance’ clauses of all policies are but methods used by insurers to limit their liability, whether using language that relieves them from all liability (usually referred to as an “escape clause”) or that used by St. Paul (usually referred to as an “excess clause”) or that used by Oregon (usually referred to as a “pro-rata clause”). In our opinion, whether one policy uses one clause or another, when any come in conflict with the “other insurance” clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.”)).

58. *Id.*

59. *Id.*

60. *Id.* (quoting *Rubin v. State Farm Mut. Automobile Ins. Co.*, 222 F.3d 750, 752 (9th Cir. 2000)).

61. *Id.* at 1022. (referencing *Sandoval*, *supra* n. 2); *see infra* discussion, Part V.

62. *Id.* (referencing *Antram v. Stuyvesant Life Ins. Co.*, 287 So. 2d 837, 840 (Ala. 1973) (reasoning that when an injured employee received a third-party recovery in excess of workers’ compensation benefits and any benefits paid by workers’ compensation were reimbursed, there was no liability on the compensation carrier to “pay” workers’ compensation benefits)); *South Carolina Ins. Co. v. Arnold*, 467 So. 2d 324, 326 (Fla. 2d Dist. App. 1985) (construing state statutes governing workers’ compensation benefits); *Grello v. Daszykowski*, 379 N.E.2d 161, 162 (N.Y. 1978) (concluding that if workers’ compensation carrier executes on lien, no-fault carrier must bear loss since reimbursed amount is not an amount recovered or recoverable under workers’ compensation) (*superseded by statute as explained in, Fox v. Atlantic Mut. Ins. Co.*, 521 N.Y.S.2d 442, 446 (N.Y. Sup. 1987)); *Moeller v. Associated Hosp. Serv.*, 106 N.E.2d 16, 18–19 (N.Y. 1952) (Fuld, J., dissenting) (noting that reimbursed workers’ compensation benefits are temporary and urging that insurance policy excluding benefits “provided for” under workers’ compensation was not intended to exclude benefits only temporarily provided); *see also infra* discussion, Part IV.

63. *Arnold*, 467 So. 2d at 324.

negative: “the State Farm exclusion at issue does not apply with respect to workers’ compensation benefits paid but ultimately reimbursed from the insured’s third-party recovery.”⁶⁴

IV. ANALYSIS OF *RUBIN*

A. Interpretation of Exclusionary Clauses

Just as the *Rubin* court found that an exclusion in med-pay coverage for workers’ compensation benefits “payable or paid” does not operate to offset workers’ compensation benefits when they are reimbursed by a third-party tortfeasor, courts from other jurisdictions have reached similar results, which provide additional explanation to the reasoning of *Rubin*.

The *Rubin* decision points to *Antram v. Stuyvesant Life Insurance Company*⁶⁵ which is representative of the position that payable or paid clauses lose their meaning after workers’ compensation has been reimbursed by the third-party tortfeasor.⁶⁶ *Antram* involved a salary continuation provision in a sickness and accident policy with a similar exclusion as the one in the State Farm policy in *Rubin*. The *Antram* court went beyond *Rubin*, finding that when the workers’ compensation carrier was reimbursed, the payable or paid language in the exclusionary clause was not ambiguous since workers’ compensation benefits were not payable because of the third-party recovery.⁶⁷ Accordingly, the insured was entitled to payment from the sickness and accident policy as well as his recovery from the third-party tortfeasor in excess of the reimbursement to workers’ compensation.⁶⁸

The opposite view of *Antram*, that workers’ compensation exclusionary clauses do not lose their meaning even after reimbursement by a third-party tortfeasor, is expressed in *Wise v. American Casualty Company*.⁶⁹ In

64. *Rubin*, 43 P.3d at 1022.

65. 287 So. 2d 837 (Ala. 1973).

66. See also *State Farm Mut. Automobile Ins. Co. v. Ley*, 844 S.W.2d 70, 71 (Mo. App. 1992) (holding that the phrase “required to be payable” contained in the exclusionary portion of State Farm’s Medical Payments Coverage was ambiguous and thus strictly construed the exclusionary clause against insurer so as to provide for coverage of medical expenses, and reasoning that the word “required” mandates conduct while the word “payable” has a passive connotation, meaning that the phrase “required to be payable” was equivalent to stating that it was mandatory that an amount “may, can or should be paid”).

67. *Antram*, 287 So. 2d at 839–40.

68. *Id.*

69. 161 S.E.2d 393 (Ga. App. 1968); see also *Milliron v. United Ben. Life Ins. Co.*, 566 P.2d 582, 584 (Wash. App. 1977) (explaining that although exclusionary clauses are to be construed in favor of the insured, the exclusionary clause was not ambiguous, and therefore, the court cannot rewrite the contract or override the apparent intention of the parties); *Kerry v. State Farm Mut. Automobile Ins.*

Wise, the plaintiff argued that because workers' compensation was reimbursed by the third-party tortfeasor, the workers' compensation benefits were never payable or paid.⁷⁰ In rejecting the plaintiff's argument, the *Wise* court held that workers' compensation was payable within the meaning of the exclusionary clause.⁷¹ The court explained further that "this result is not changed by the fact that the employer was subsequently reimbursed for medical expenses actually paid to the plaintiff In effect, reimbursement to the employer was made, not by the plaintiff, but by the tortfeasor."⁷²

Although there are two opposing approaches to whether such exclusionary clauses contain ambiguities, the fact that courts have found ambiguities in such clauses seems to be results-oriented. That is to say, it appears that courts have found ambiguities in these situations only for the purpose of construing the language against the insurance companies for the sole purpose of allowing plaintiffs to recover.

B. Workers' Compensation Benefits Never Received

Rubin heavily relied upon *South Carolina Insurance Company v. Arnold* in reaching its final conclusion that the exclusion did not apply.⁷³ The *Arnold* court notes that when workers' compensation benefits are received and reimbursed, it is as if the benefits were never received.⁷⁴ Moreover, the court explains that when only the tortfeasor and the insured are involved in an accident, there is no question that the insured is entitled to no-fault benefits.⁷⁵

Under the representative *Arnold* view that workers' compensation benefits are never received, and that as a corollary, exclusionary clauses are inoperative, cases involving the *Rubin* situation should simply be treated as though workers' compensation was never a party. As such, the insured would be entitled to recovery from the tortfeasor, and the only per-

Co., 395 N.E.2d 375, 376 (Ohio App. 3d Dist. 1978) ("Where, however, the language of the policy is clear, as it is here, no need for construction arises and the rule of strict construction has no application."); *Starett v. Oklahoma Farmers Union Mut. Ins. Co.*, 849 P.2d 397, 400 (Okla. 1993) (holding that an exclusion in an automobile insurance policy, which excludes coverage for the insured's medical expenses when those expenses had been paid under the workers' compensation law, does not reserve the insurer's right to subrogation or set-off for medical payments made to the insured under the policy. It is, rather, a contractual exclusion of coverage to the extent the insured is reimbursed by workers' compensation.).

70. *Wise*, 161 S.E.2d at 393.

71. *Id.*

72. *Id.* at 393–94.

73. 467 So. 2d 324 (Fla. 2d Dist. App. 1985).

74. *Id.* at 325–26.

75. *Id.*

minent question regarding the private automobile insurance company would be whether med-pay benefits are subject to subrogation or offsetting, depending on what order the benefits are received.⁷⁶

Since it has been established in Nevada that med-pay benefits are not subject to subrogation,⁷⁷ *Rubin* correctly held that the plaintiff was entitled to both med-pay benefits and any excess recovery from the third-party tortfeasor. Yet, even in those jurisdictions where a similar policy against subrogation of med-pay benefits exists, the policy should be revisited because of the repercussions, discussed below, that such a policy brings.

V. A BETTER APPROACH TO THE *RUBIN* SITUATION

A. *The Purpose of No-Fault Med-Pay Benefits is not Frustrated*

The main purpose of no-fault med-pay benefits is to provide prompt medical benefits to the insured.⁷⁸ Under the Arnold approach to the *Rubin* situation, it is held that when the workers' compensation is reimbursed, it is though as workers' compensation was never a party to the action. The *Rubin* court ingeniously points out, however, that the initial workers' compensation benefits were "akin to an advance."⁷⁹ In this point alone, there is a great difference between the *Rubin* situation and the situation when workers' compensation is absent.

Because workers' compensation provides an "advance," the employee/insured is provided with immediate and prompt medical benefits. As such, workers' compensation replaces the need for immediate and prompt benefits from med-pay coverage.⁸⁰ In this sense, the workers' compensation carrier is the primary no-fault benefits provider, which is consistent with the policy that workers' compensation provides benefits coverage for injuries sustained in the course and scope of employment.⁸¹ Therefore, when subrogation or offsetting of med-pay benefits is permitted, the purpose and need for immediate and prompt medical benefits is not frustrated.

76. See *supra* discussion, Part II.B.

77. *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 813 (Nev. 1986) ("We hold that a subrogation clause under which the insurer obtains subrogation rights from its insured for medical payments violates public policy.").

78. See *supra* discussion, Part II.A.

79. *Rubin*, 43 P.3d at 1021.

80. See *Perez v. State Farm Mut. Automobile Ins. Co.*, 344 N.W.2d 773 (Mich. 1984) (noting the inverse that when workers' compensation benefits are not immediately received because of employer failure to carry or employee failure to claim, no-fault benefits from automobile insurance policy are available).

81. See *infra* discussion, Part V.C.

*B. Discouraging the Windfall of a Double Recovery*⁸²

In the ordinary subrogation situation, when workers' compensation is not involved, the recovery of med-pay benefits from the insurer as well as payment for medical expenses from the tortfeasor is not considered an impermissible double recovery in Nevada.⁸³ The policy behind this permissible double recovery is that when an insured receives med-pay benefits, he is "merely receiving the benefits for which he has already paid."⁸⁴ And, if subrogation were allowed, it would result in "a windfall recovery for the insurer" because premiums are usually not lowered after subrogation.⁸⁵

This "windfall recovery" of insurance premiums hardly compares to the double recovery an employee/insured receives for one physical injury.⁸⁶ Once the employee/insured's medical bills are paid by workers' compensation, and subsequently replaced with a recovery from the third-party tortfeasor, the employee/insured no longer has need to be reimbursed for medical expenses. But without subrogation and offsetting, the em-

82. See generally Andrea L. Parry, *Subrogation in Pennsylvania—Competing Interests of Insurers and Insureds in Settlements with Third-Party Tortfeasors*, 56 Temp. L.Q. 667 (1983) (discussing the priority problems in Pennsylvania when two insurers have subrogation rights over the same proceeds of a third-party recovery); Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997) (commenting on various methods of subrogation and advocating a pro tanto approach to insurance subrogation, which allows the insurance company to recover before the insured has been made whole); Todd L. Fulks, *The "Made-Whole" Doctrine: Its Effect on Tennessee Tort Litigation and Insurance Subrogation Rights*, 32 U. Mem. L. Rev. 87 (2001) (commenting on the Tennessee "made-whole" doctrine which does not allow insurance companies of plaintiffs to exercise their subrogation rights against third-party tortfeasors when the court makes a finding, which is sometimes arbitrary, that plaintiff has not been made whole).

83. *Maxwell*, 728 P.2d at 815.

84. *Id.*

85. *Id.* This same argument can also be made as against workers' compensation insurance after it seeks subrogation in *Rubin* situations. See *infra* discussion, Part V.C.

86. *Ellison v. California State Automobile Assn.*, 797 P.2d 975, 977 (Nev. 1990) ("[T]he setoff clause only operates to prevent double recovery for the same elements of damage'. . . . A recovery in excess of one hundred percent of damages is a windfall which this court will not countenance absent a clear agreement providing for such coverage.") (emphasis added); *Mid-Century Ins. Co. v. Daniel*, 705 P.2d 156, 159 (Nev. 1985) (holding that "because Daniel has received or been awarded compensation to the full extent of her injuries, we conclude that Daniel is not entitled to an additional \$ 10,000.00 in underinsured motorist benefits. To hold otherwise would allow Daniel a double recovery for the same item of damages."); *State Farm Mut. Automobile Ins. Co. v. Cramer*, 857 P.2d 751, 754–55 (Nev. 1993) (finding that insured was not entitled to additional reimbursement for his medical expenses under his catastrophic medical expense rider with insurer because it was excess coverage and he was fully compensated under his health and automobile insurance policies); *Laurence v. State Farm Mut. Automobile Ins. Co.*, 984 S.W.2d 351, 354 (Tex. App. Austin Dist. 1999) ("A right of subrogation evinces a policy that an injured person be made whole, but not better than whole '[I]n no event shall the insured recover under both coverages more than the actual damages suffered.'"); *LeBeau v. John Deere Ins.*, 574 N.W.2d 83, 86 (Minn. App. 1998) ("The district court properly concluded that John Deere is not liable to pay any amount of LeBeau's claim that would result in a double recovery; the record indicates, however, that the payment of \$500.05 would not result in a double recovery.").

ployee/insured receives an additional payment for medical expenses that cannot be applied to medical expenses.⁸⁷

The representative view of *Arnold*, as adopted in *Rubin*, contends that the employee/insured should not be penalized simply because he was hurt on the job.⁸⁸ This argument only makes sense if a double recovery is assumed. For example, when an employee/insured has had all of his medical expenses paid, and has possibly received a recovery for other expenses and losses from the third-party tortfeasor, it is supposedly a detriment to the employee/insured if he is not given a second set of payments for his physical injury.⁸⁹

Interestingly, this double recovery that the employee/insured receives is the very equity enforced when the workers' compensation carrier subrogates against the third-party tortfeasor.⁹⁰ Equity for the workers' compensation carrier should also be equity for the private automobile insurance companies; however, since the workers' compensation carrier has the primary right of subrogation, the private automobile insurance company should be permitted to offset funds that the insured has recovered from the third-party tortfeasor.⁹¹ The only party punished should be the third-party tortfeasor.⁹² The appropriate remedy for this problem is subrogation and offsetting of med-pay benefits.

87. See *Moeller v. Associated Hosp. Serv. of Capital Dist.*, 106 N.E.2d 16, 17 (N.Y. 1952) ("The initial liability is the employer's, and the ultimate liability therefor falls, as it should, upon the wrongdoer responsible for his injuries. To adopt plaintiff's view would give him a windfall; without paying these expenses, he would in effect be collecting his hospital bill from the third-party wrongdoer for his employer, and again from the defendant.").

88. *Rubin*, 43 P.3d at 1021-22.

89. *Moeller*, 106 N.E.2d at 17-18 ("When it is recognized that the statute provides for hospital care in any event, giving to the employer or its carrier a right of recovery against the third party through the medium of the employee's action against said party, or, if the employee chooses not to sue, through its own action, it becomes apparent that the employee does not pay for his own hospital service. The initial liability is the employer's, and the ultimate liability therefor falls, as it should, upon the wrongdoer responsible for his injuries. To adopt plaintiff's view would give him a windfall; without paying these expenses, he would in effect be collecting his hospital bill from the third-party wrongdoer for his employer, and again from the defendant.").

90. See *Employers Ins. Co. of Nev. v. Chandler*, 23 P.3d 255, 258 (Nev. 2001) ("In fact, when read within the context of NRS 616A.035, NRS 616A.090, and NRS 617.130, the term 'compensation' in NRS 616C.215 clearly and unambiguously includes medical benefits. Further, the contemplated purpose of NRS 616C.215 is to make the insurer whole and to prevent an employee from receiving an impermissible double recovery.").

91. See *supra* discussion, Part II.B.

92. See *Moeller*, 106, N.E.2d at 17; *Cochran v. Miss. Hosp. & Med. Servs.*, 182 So. 2d 597, 598 (Miss. 1966) (The court found that an insured who was injured on his job and who had his medical bills paid by his employer's compensation carrier, but subsequently reimbursed the compensation carrier for such payments out of a recovery by him and the carrier in a third-party suit against the negligent tortfeasor, was not entitled to recover on the policy sued on. Affirming the judgment in favor of the insurer, the court pointed out that the insured did not pay his own medical expenses, since the initial liability under the statute was with the employer, and that the ultimate liability fell upon the wrongdoer responsible for his injuries, and concluded that to adopt the insured's view would give him a windfall,

C. Primary Coverage for Injuries in the Course and Scope of Employment by Workers' Compensation

Although *Rubin* acknowledges that injuries sustained in the course and scope of employment should be covered by workers' compensation,⁹³ *Rubin* considers the policy of allowing policyholders to receive med-pay benefits for their premiums to be more important, despite a permissible double recovery by the insured. Accordingly, *Rubin* and similar cases result in the two bad public policies of (1) requiring private automobile insurance companies to provide, in essence, primary coverage for injuries sustained in the course and scope of employment; and (2) allowing employees/insureds to receive double recovery.⁹⁴

The California case *Bailey v. Interinsurance Exchange of the Automobile Club of Southern California* points out that workers' compensation is the primary carrier to look to when there are injuries in the course and scope of employment, notwithstanding the *Rubin* situation:

Workmen's compensation coverage is an integral part of our insurance system in providing medical coverage for persons injured in the course of their employment, and a person who has been injured in the course of his employment through the acts of a third party tortfeasor generally looks to the workmen's compensation carrier as the primary provider of medical benefits Hence, it has become commonplace in various forms of medical and disability insurance policies to include an exclusion from the policy for benefits obtainable under workmen's compensation law. These exclusions are clearly consistent with public policy.⁹⁵

Furthermore, when a third-party tortfeasor causes the injury, it is equitable to compel the third-party tortfeasor to provide coverage for the loss, thereby shifting the burden from workers' compensation to the third-party tortfeasor. There is, however, no justification for allowing the burden to provide coverage to pass to the private automobile insurance companies. Hence, it is bad public policy to require private automobile insurance companies to provide primary coverage for injuries sustained in the course and scope of employment.⁹⁶ This has expressly been admitted in Florida⁹⁷ and

since that would allow him to collect his medical bills from the third-party wrongdoer for his employer, as required by the statute, and again for himself under the policy in question.).

93. *Rubin*, 43 P.3d at 1020.

94. See *supra* discussion, Part V.B.

95. 122 Cal. Rptr. 508, 510 (Cal. App. 1975).

96. See *Fox v. A. Mut. Ins. Co.*, 521 N.Y.S.2d 442, 446-47 (N.Y. Sup. 1987) (acknowledging the problem of having the private automobile insurance company provide primary coverage for injuries

will be the eventual result of the holding in *Rubin*, especially when workers' compensation provides nothing more than an advance. To counter this bad public policy, subrogation and offsetting of med-pay benefits by the private automobile insurance company should be allowed.

VI. CONCLUSION

When an employee is injured in the course and scope of his employment, workers' compensation provides coverage for medical expenses. When a third-party tortfeasor is the cause of the employee's injury, however, workers' compensation will assert its subrogation rights to reimburse itself for benefits paid to the employee. Furthermore, when courts allow the employee to also recover on a private automobile insurance policy with med-pay benefits, the courts have essentially required no workers' compensation coverage for an injury sustained in the course and scope of employment. The private automobile insurance company becomes the primary coverage for such injuries. These two resulting bad public policies can be abrogated by allowing the private automobile insurance company to subrogate and offset med-pay benefits whenever such equitable measures are needed to prohibit double recovery by the employee/insured.

sustained in the workplace, and noting state legislation which has attempted to make workers' compensation the primary carrier for workplace injuries).

97. *Fortune Ins. Co. v. McGhee*, 571 So. 2d 546, 547 & n.1 (Fla. App. 1990) ("Florida Statutes § 627.736(4) (1985), effectively makes both PIP and workers' compensation primary coverage for a work-related automobile accident. It is unusual for two insurance companies to provide primary coverage without a system to determine permanently their respective priorities through 'other insurance' clauses or similar procedures. The problems demonstrated by this case and similar cases suggest that the legislature might well reconsider the advisability of making both PIP and workers' compensation primary coverage in these cases. Although the primary responsibility for claims handling may rest logically with the workers' compensation carrier, it would be simpler if the primary responsibility for the payment of benefits rested with the PIP carrier to the extent of that coverage. That method would eliminate the need for subsequent reimbursements.")